

Legal Advice *v* *Access to the Courts*

Do YOU know the difference?

NOTE: The content of this training is available on-line at:

www.courts.mi.gov/mji

Click on “Resources”

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**Michigan Judicial Institute
PO Box 30205
Lansing, MI 48909
517/373-7171**

Introduction

Every day every clerk in every court in every state is bombarded with questions about courts, procedures, judges and cases. Most court clerks have been told they cannot give legal advice when answering questions. Many courts have posted signs informing the public that court clerks are not allowed to give legal advice. And probably every clerk in every court in every state has, at one time or another, repeated the phrase, “I’m sorry. I’m not allowed to give legal advice.”

Do you know what information can be provided and what information would be considered legal advice?

- Can a clerk tell parties whom they should sue?
- Can a clerk tell a party what form to use?
- Can a clerk tell parties what their options are?

If you don’t know the answers, don’t worry because you are not alone. Clerks in courts across the country have questions about what is and isn’t legal advice.

Purpose of this Training:

This training is designed to help court staff understand the types of information they can provide. It is specifically designed for court support staff who provide telephone and counter assistance as a major part of their job duties.

This training will cover three areas:

- The reasons court clerks cannot provide legal advice;
- Guidelines for determining what is and is not legal advice; and
- Commonly asked questions

Why Court Clerks Are Not Allowed to Give Legal Advice

Although court clerks are told that they cannot give legal advice, they usually do not know why. There are several reasons:

Neutrality¹: Court clerks must remain neutral and cannot promote or recommend a particular course of action. Even though a clerk may have processed hundreds of similar types of cases, he or she is not in a position to know what is in a litigant's best interest. Only litigants or their attorneys can make that determination.

Impartiality²: Court clerks have an "absolute duty of impartiality". A court employee can "never give advice or information for the purpose of favoring one court user over another." This is very important because court clerks have considerable knowledge about the way in which their court functions. That knowledge must be shared fairly and in a manner that does not involve the disclosure of confidential or ex parte communication. "Advising a party 'what to do' rather than 'how' a party might do what it has already decided crosses the line from impartiality to partiality, from providing permissible information to giving prohibited 'legal advice' or engaging in the unauthorized practice of law."

Unauthorized practice of law: Every state has laws prohibiting the unauthorized practice of law. Only attorneys licensed by the state are permitted to practice law and give legal advice. Since court clerks are generally not attorneys, they cannot give legal advice because giving legal advice is considered the unauthorized practice of law. If a court clerk were an attorney, he or she should still not give legal advice as an employee of the court because it would violate the concepts of neutrality and impartiality.

¹ *The Ethics Field Book: Tools for Trainers*, Cynthia Kelly Conlon, J.D., Ph.D. Funded by a grant from the State Justice Institute, ©American Judicature Society, 1995.

² *The Ethics Field Book: Tools for Trainers*, *ibid*.

The Importance of Understanding What Is and Is Not Legal Advice

Every day court clerks are bombarded with questions about courts, procedures, judges, and cases. Their job involves providing information to the different people that request or require it, including the general public, attorneys, parties, legal secretaries and paralegals. Each has different levels of understanding and different needs. Court clerks must help all of them while staying impartial and neutral and without giving legal advice. How they respond to the questions they are asked affects how the public views the court system. How they respond will most certainly affect the attitude of the public during their court involvement. And, how they respond could affect the outcome of a case. An accurate understanding of a court clerk's primary functions makes it clear that it is important to know what is and is not legal advice.

1. **Providing Access:** Most people are not familiar with courts and court procedures and must depend to a large degree on court clerks for information on the court system. As a result, court clerks play a very important role as a "gatekeeper" providing access into the court system. If people do not know how to use the system and court clerks do not tell them, they are being denied access.
2. **Providing Service:** An important duty of all court employees is to provide service to the public. Providing information is a very important part of providing service. Therefore, it is important to understand what information can be provided and what information cannot.
3. **Pro Per Litigation:** An increasing number of people are representing themselves and are not being represented by attorneys. The burden will fall on court support staff to be able to assist these parties without crossing the legal advice line.

Guidelines for Determining What Is and Is Not Legal Advice

“How do I know what is and isn’t considered legal advice?”

This is perhaps the number one question asked by court clerks, and there is no easy answer. Court clerks have a tremendous amount of knowledge about the court system and are supposed to provide information as part of their duties. But how are they supposed to know what information they can provide and what information they cannot? How can they know when they are crossing the invisible legal advice line?

Unfortunately there is never going to be a book or manual that clearly identifies every question court clerks get asked and what questions they can or cannot answer. However, there are some very specific guidelines that can be used to help define the legal advice line.

TABLE 1. Legal advice guidelines for court clerks	
Can Provide	Cannot Provide
<ul style="list-style-type: none"> • Legal definitions • Procedural definitions • Cites of statutes, court rules and ordinances • Public case information • General information on court operations • Options • Access • General referrals • Forms and instructions on how to complete forms 	<ul style="list-style-type: none"> • Legal interpretations • Procedural advice • Research of statutes, court rules and ordinances • Confidential case information • Confidential or restricted information on court operations • Opinions • Deny access, discourage access or encourage litigation • Subjective or biased referrals • Fill out forms for a party

TABLE 2.	
Can provide legal definitions	Cannot provide legal interpretation
Reason: Legal terminology can be confusing and difficult. Providing definitions of legal terms or procedures helps the public understand the court system and does not involve the unauthorized practice of law.	Reason: Court clerks cannot provide legal interpretations because it would be considered the unauthorized practice of law and would violate the concepts of neutrality and impartiality.
Example: What is child abuse?	Example: My neighbors leave their kids home all day without supervision. Is that child abuse?
Response: According to this dictionary of legal terms, child abuse is “the mistreatment of a minor by an adult legally responsible for the minor.”	Response: I am not an attorney and cannot make a legal interpretation. However, I can refer you to someone that can help you.
Tip: Resources for providing legal definitions include statutes, court rules and a dictionary of legal terms.	

TABLE 3.	
Can provide <i>procedural definitions and explanations</i>	Cannot provide <i>procedural advice</i>
Reason: Court procedures can be confusing. Explaining various procedures increases the public's understanding of the system and does not violate the concept of neutrality.	Reason: Court clerks cannot give procedural advice, because in doing so they may favor one party over another or may encourage or discourage a party from a particular course of action. Court clerks must remain impartial and neutral at all times. Clerks can, however, point out various factors that individuals can consider to make the decision themselves.
Example: What happens at an arraignment?	Example: Whom should I sue?
Response: The arraignment is the first appearance before the court. Defendants are notified of the charges and informed of their rights, including the right to an attorney, bond is set, and a plea may be entered.	Response: I cannot tell you whom to sue because I cannot give you legal advice. If you aren't sure who to sue, who do you feel owes you the money?
Tip: Whenever you hear the word "should", it is a tip that you are being asked for advice.	

TABLE 4.	
Can provide <i>cites for statutes, court rules and ordinances</i>	Cannot provide <i>research of statutes, court rules and ordinances</i>
Reason: A court clerk may cite the legal authority for a specific procedure.	Reason: Court clerks cannot research statutes, court rules and ordinances for parties because it would be considered the unauthorized practice of law and violates the concepts of impartiality and neutrality.
Example: An employer asks if the employer has to file a disclosure with the court every time an employee's paycheck is garnished.	Example: Please provide me with a copy of all of the laws regarding stalking.
Response: No. The court rules only require a disclosure to be filed within 14 days after the date the writ was served.	Response: I'm sorry, but I am not allowed to do legal research.
Tip: Have copies of court rules and most commonly used statutes available. In determining what is considered research, consider whether the material or information requested is something that should be known as a part of the clerk's job and whether the information is readily available or would require compilation.	

TABLE 5.	
Can provide case information that is a matter of public record	Cannot provide confidential case information
Reason: Court clerks can provide case information that is public. Most court records are considered public records and, therefore, are available to the public.	Reason: Court clerks cannot disclose non-public or confidential information. It is very important that clerks understand what information is confidential.
Example: Is there an estate file open for Beth Hall?	Example: May I see the Kramer adoption file?
Response: Yes, there is. It is a public record. Would you like to see it?	Response: I'm sorry. Adoption files are confidential and not able to be viewed by the public.
<p>Tip: If asked about a confidential record, a court clerk may confirm its existence but cannot provide any other information.</p> <p>Note: If you are not sure which records are public and which records are confidential in your court, check with your supervisor.</p>	

TABLE 6.	
Can provide <i>general information about court operations</i>	Cannot provide <i>confidential information about court operations</i>
Reason: Court clerks have considerable knowledge and information about how a court functions. Sharing this knowledge of general court operations is not considered legal advice.	Reason: Court clerks cannot disclose confidential information about court operations or ex parte communications because it can give one side an unfair advantage.
Example: How long before I become the guardian?	Example: How do I get a particular judge assigned to my case?
Response: Hearings generally are scheduled in four to six weeks, and a determination is made at that time.	Response: I'm sorry, I can't give you information about the court's internal assignment procedures.
Tip: Is the information sought for the purpose of having knowledge of the court's policies and/or procedures, or is the client hoping to get an advantage through the information? For example, if parties have confidential information about a court's case assignment procedures, they could "judge shop".	

TABLE 7.	
Can provide <i>options</i>	Cannot provide <i>opinions</i>
Reason: Court clerks can provide information on the various procedural options available and can explain how to do something.	Reason: Court clerks cannot give an opinion on or otherwise advise parties to use a particular procedure or remedy.
Example: How can I collect my judgment?	Example: Should I file a writ of garnishment or a writ of execution?
Response: You have several options. If you know where the defendant is employed or has a bank account, you can file a writ of garnishment. If you know of property that they own, you can file a writ of execution. Otherwise, you can file a discovery subpoena to determine what assets, if any, they have.	Response: I can explain the difference between the two types of writs, but I cannot tell you what to do or give you an opinion on which option to select. That's a decision you have to make.
Tip: Telling someone "how" to do something does not usually cross the legal advice line. Telling someone what he/she "should" do, does cross the legal advice line.	

TABLE 8.	
Can <i>facilitate access</i>	Cannot <i>deny or discourage access, nor encourage litigation</i>
<p>Reason: Most people are not familiar with the court system. They often cannot describe their problem in legal terms. Court clerks are the gatekeepers to the system. It is their job to ensure that the court system is accessible. The information that is presented, and the manner in which it is presented, can affect how accessible the system is.</p>	<p>Reason: Most people are not familiar with court procedures or terminology. Legal advice should not be used as an excuse not to provide service. If the question is not asked in the right way, take the time to clarify what is being asked.</p>
<p>Example: How do I <i>convict</i> my renter?</p>	<p>Example: How do I take care of a civil <i>infection</i>?</p>
<p>Response: Do you want to evict your renter? The court that handles landlord/tenant disputes is down the hall.</p>	<p>Example: Civil infections are handled by the health department.</p>
<p>Tip: In the examples above, the client was using incorrect terminology. Often it is necessary for a court clerk to ask questions to determine what the client is really asking rather than make an inappropriate referral. (Examples include the mistake of identifying Mr. Pro Per as an attorney rather than realizing it is an indicator that a party is acting on his/her own behalf, incorrect usage of guardian vs. custodial parent, etc.)</p>	

TABLE 9.	
Can provide <i>general referrals</i>	Cannot provide <i>subjective or biased referrals</i>
Reason: General referrals can be made to agencies and associations that can provide additional information and assistance. Sometimes people call the court when they don't know whom to call.	Reason: Court clerks must remain neutral and impartial and cannot make referrals to specific individuals.
Example: I'm not sure I'm calling the right place, but I need to talk to someone about my birth certificate.	Example: Can you give me the name of a good criminal attorney?
Response: Let me give you the phone number for the county records division.	Response: I can't refer you to a specific attorney, but you might want to check the yellow pages. Some attorneys list their areas of specialty there.
Tip: Good general referrals include yellow pages and local bar associations.	

TABLE 10.

<i>Can distribute forms and instructions on how to complete forms</i>	<i>Cannot fill out forms <u>unless</u> there is a handicap or physical disability that prevents the person from filling out the form</i>
Response: Court clerks must facilitate access to the court system.	<p>Response: Court clerks should not fill out forms for parties because it violates the principles of neutrality and impartiality.</p> <p>However, there may be some situations where it is appropriate for clerks to record information on a form. Some examples include language barriers (illiteracy or foreign language) and physical handicaps (blindness or deafness).</p>
<p>Tip: The following is a recommendation for handling these situations:</p> <ol style="list-style-type: none"> 1. Exhaust all other possibilities first. Is there someone with them who can assist? Is there a literacy council that provides volunteers, or is an interpreter available? 2. If there are no other alternatives, the clerk must record exactly what is said, confirm the information with the party, make a notation on the document, and have the party sign the form. 3. If possible, it is recommended that a witness, such as another clerk, be present to witness. <p>Note: This is a very difficult issue. Although courts have an obligation to facilitate access and are required under the Americans with Disabilities Act to accommodate individuals with disabilities, courts also have an obligation to remain neutral and impartial.</p>	
<p>When court clerks realize that most of the questions they are asked fall into the nine categories we have discussed, it is much easier for them to accurately draw the “legal advice” line and understand what is and what is not legal advice. With that understanding, clerks can provide access to the courts and service to the public while remaining impartial and neutral.</p>	

Conclusion

SAMPLE ACTIVITIES

If you have created activities around legal advice for your staff
and would be willing share them with other courts by adding
them to this activities section, please
e-mail activities to:

eggerv@courts.michigan.gov

or mail to the Michigan Judicial Institute at the address posted
on the front of this document.

LEGAL ADVICE EXERCISE

DIRECTIONS: Review the questions below. Would the response required constitute legal advice? How would you reply to each of these questions in an effort to provide quality customer service?

1. A carpenter who is completely unfamiliar with the small claims court system comes to the counter. He wants to sue a dance studio that never paid him for installing a wood floor.
He asks:
 - what forms to use?
 - how to find out the legal name of the company?
 - how to find out if the company is a corporation?
 - how much money to ask for?
 - whether to pay extra to have the complaint served by the sheriff?
 - how long it will take until you get your money?
2. An attorney who was recently sworn in as a member of the bar comes to the counter. She is handling her sister's divorce and needs to know the following:
 - is this the right place to file the complaint?
 - how much are the filing fees?
 - which judge is likely to hear this case?
 - is there a set formula that judges use in awarding child custody?

TIME REQUIRED FOR THIS ACTIVITY

60 Minutes

GOALS OF THE ACTIVITY:

- 1) To assist court staff in identifying which records are public and which are not.
- 2) To assist court staff in providing exceptional customer service while complying with court rules.

Serving The Self-Represented Litigant

REVIEWING COURT POLICIES

Public / Non-Public Records

PREPARATION:

 You will need -

1. A copy of procedures / policies related to public / non-public files used in your Court.
2. An overhead of the quote on page 7 of the Participant Packet, (*Constitutional Principles & Self Representation*) or the quote rewritten on a blackboard or easel large enough for the group to see.

ICEBREAKER:

 (*For a group of participants who may not be acquainted with each other.*)

Ask participants to go around the room and introduce themselves and share the best thing that happened to them during the last week

INTRODUCTION:

 (*tailor as needed*)

FACILITATOR: “Citizens are entitled access to MOST court records. This is governed by Michigan Court Rule and also by Court Administrative Orders. Courts are NOT subject to the Freedom of Information Act, pursuant to MCL 15.232 (b) (v). It is important to know which records are available for access by the public and which are not. That is the topic for today’s session.”

ACTIVITY:

1. Show overhead of “*Constitutional Principles...*” quote for group to read.
2. ASK: “What challenges does this present to us a court staff?” (*RESPONSE should refer to how to provide good customer service when court staff are, by law, required to keep some records confidential.*)
3. FACILITATOR: “Part of the challenge we have as court staff is to be clear on which records are confidential and which are public. Let’s look at the sheet ‘*Non-Public Records*’.”
4. REVIEW EACH ITEM. After each item, ensure that court staff are clear as to how each type of non-public file is marked / designated / stored, etc., in your court.
5. WHAT SHOULD YOU DO IF YOU ARE UNSURE IF A FILE IS PUBLIC?
(*Discuss your court’s procedures*)
6. FACILITATOR: “What questions do you have?”

CONCLUSION:

FACILITATOR: “Thank you for participating today. I hope the information we have discussed helps clarify for you which records are public and which records are non-public and what to do if you are unsure of their designation.”

NON-PUBLIC RECORDS

CONTROLLED SUBSTANCE ACT CASES UNDER MCL 333.7411

Probation of individual with no previous conviction; entering adjudication of guilt upon violation of probation; discharge and dismissal without adjudication of guilt; **nonpublic record** of arrest and discharge and dismissal; effect of civil fine for first violation; requiring individual to attend course of instruction or rehabilitation program; failure to complete instruction or program as violation of probation; screening and assessment; participation in rehabilitative programs; payment of costs; failure to complete program as violation of probation.

Notes pertaining to such files in our Court:

SPOUSE ABUSE ACT CASES UNDER MCL 769.4A

Assault on spouse, former spouse, individual with child in common, or household resident; plea or finding of guilty; deferral of proceedings and order of probation; previous convictions; adjudication of guilt upon violation of probation; mandatory counseling program; costs; circumstances for entering adjudication of guilt; discharge and dismissal; limitation; **nonpublic record**.

Notes pertaining to such files in our Court:

HOLMES YOUTHFUL TRAINEE ACT CASES UNDER MCL 762.14

Discharge of individual and dismissal of proceedings upon final release; assignment as youthful trainee not conviction; compliance with sex offenders registration; proceedings **closed to public inspection**; inspection by courts, state departments, and law enforcement personnel.

Notes pertaining to such files in our Court:

SETTING ASIDE CONVICTIONS CASES UNDER MCL 780.623

Sending copy of order to arresting agency and department of state police retention and availability of **nonpublic record** of order and other records; providing copy of nonpublic record to person whose conviction set aside; fee; nonpublic record exempt from disclosure; prohibited conduct; misdemeanor; penalty.

Notes pertaining to such files in our Court:

PROBATION DEPARTMENT FILES including pre-sentence investigation and alcohol assessment reports

Notes pertaining to such files in our Court:

CRIMINAL HISTORY RECORDS W/ NON-CONVICTION DATA

Notes pertaining to such files in our Court:

SUPPRESSED SEARCH WARRANT during period of suppression.

Notes pertaining to such files in our Court:

OTHER:

TIME REQUIRED FOR THIS ACTIVITY

60 Minutes

GOALS OF THE ACTIVITY:

To identify the appropriate response to questions posed by self-represented litigants.

PREPARATION:

You will need:

1. Index cards – enough so that each participant has 3-4 cards.
2. A container in which cards can be dropped in and then drawn out.
3. Flip chart, blackboard, or something similar to jot down participant ideas.
4. Copies of page 13 of this packet (*Questions Posed...*) - one for each participant.



Serving The Self-Represented Litigant

FREQUENTLY ASKED QUESTIONS**ICEBREAKER:** (*For a group of participants who may not be acquainted with each other.*)

Ask participants to go around the room and introduce themselves and tell about their favorite place to go on vacation.

INTRODUCTION: (*tailor as needed*)

FACILITATOR: “Every day, court clerks are confronted with questions from people who need assistance. Sometimes it’s difficult to know how to respond. Today, we are going to identify some of those ‘most frequently asked questions’ and identify a strategy for addressing the questions in a way that honors the needs of the court customer without violating the principles of neutrality and impartiality.”

ACTIVITY:

1. Hand out index cards or have a pile of cards on each table.
2. **FACILITATOR:** “Let’s begin by identifying some of the common questions you as a court clerk are generally confronted with. Take a couple of minutes. Jot down as many questions as you can think of, one on each index card, using as many cards as you need.
3. When everyone is finished or time is up, have participants drop question cards into container.
4. Pass out “*Questions Posed...*” worksheet. Encourage participants to take notes using the worksheet.
5. Ask for a volunteer to reach into container and draw out one card and read the question to the group.
6. Write the question that is read on the flipchart or blackboard.
7. Ask the group to brainstorm ideas as to how to respond to the question. Accept all suggestions.
8. After group runs out of ideas, comment that all the suggestions may be good suggestions. Ask the group to identify which response might be the “best” and why. As a group, try to come to consensus on a “best” response. Have the group document the best response on their worksheets
9. Repeat the process with the remaining questions in the container as time allows.

CONCLUSION:**FACILITATOR:**

“Thanks for all of the great ideas you have shared today. By working together and coming up with responses that meet the needs of the customers, we have made our jobs a little easier while fostering public confidence and trust with our customers. I hope you will use these responses while you are at the counter if the opportunity arises. Thanks, again.”

QUESTIONS POSED BY SELF-REPRESENTED LITIGANTS

Identify the questions most often posed in your court by self-represented litigants.

(Some examples are already given.) Then write down the “best” response to each question.

QUESTION	APPROPRIATE RESPONSE
1. Do I need a lawyer?	
2. What happens if I plead guilty?	
3. What should I put down here where it says “remedy sought”?	